federal agency, it is quite likely that its actions would satisfy the first prong of the test. For example, when a state agency is authorized to regulate and set rates, its approval of anticompetitive behavior implies that the behavior is supported by government policy. See DFW Metro Line v. Southwestern Bell, 988 F.2d 601 (5th Cir. 1993) (rate setting by state public utility agency constitutes "articulated state policy"). Here, the FCC is an agency that has been granted regulatory authority over the communications industry, therefore, if the FCC set up a group of private business interests to negotiate and discuss trade issues, such action would most likely be considered to be supported by government policy.[18]

However, whether the organization would be entitled to "state action" antitrust immunity would depend upon the second prong of the test--whether the anticompetitive actions are "actively supervised" by the government agency. The Supreme Court recently clarified the requirements of active supervision:

[T]he purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. [T]he analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.

FTC v. Ticor Title Ins. Co., 112 S. Ct. 2169, 2177 (1992). In Ticor, title insurance companies in several states had established rating bureaus to set uniform rates for their members. The rating bureaus were private entities, but were licensed and authorized by the States to set rates. Although the Court remanded to determine whether the States had exercised sufficient supervision to grant "state action" immunity, the Court held that the mere rubber stamping of rates would not constitute sufficient supervision. Indeed, the Court specifically concluded that negative option rules, in which the rates became effective unless rejected within a set time, would not meet the standard. Id. at 2178.

Ticor sounds rather analogous to one of the possibilities you described, i.e. the FCC would authorize the establishment of a group comprised of private and non-governmental interests to make policy and rate recommendations. Under Ticor, if the FCC merely acted as a rubber stamping agency, and approved the suggested positions without an independent analysis, it seems likely that state-action immunity would not apply. However, if the FCC did engage in an independent review of the policies, immunity would be much more likely to attach. According to Ticor, any anticompetitive scheme must be the agency's own.

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[18]The specific terms of the authorizing instrument could bolster or weaken this conclusion.

B. Antitrust Liability if the State is not Involved

If no state agency is authorizing this group of private interests, their actions may still be immune from antitrust liability through the Noerr-Pennington Doctrine. Noerr-Pennington requires that, private business agreements to attempt to influence legislative, judicial, or administrative action, must be shielded from antitrust liability. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499 (1988). However, this doctrine does not extend to all attempts to influence governmental bodies. From reviewing recent cases, it appears that important considerations in determining whether liability would apply, include the motivations of the persons' concerted activity, and the manner in which they attempt to influence government. For example, if the motives are political and not economic, the behavior would be more likely to be afforded immunity under Noerr-Pennington. See NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982).

Clairborne Hardware involved black citizens boycotting white merchants in Claiborne County, Mississippi. The Court held that such a boycott was entitled to First Amendment protection, and thus, was shielded from antitrust liability. The Court reasoned that the motivation behind the boycotters' activities was an attempt to change a social order, and that the individuals sought no economic advantages for themselves.

In contrast, the Supreme Court recently refused antitrust immunity for court-appointed attorneys who entered into an agreement among themselves to refuse to accept new appointments until the District of Columbia increased their fees. See FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990). The Court in Superior Court distinguished Clairborne Hardware by the motivations of the participants. The Court concluded that the immediate objective of the attorneys was to increase the price that they would be paid for their services, therefore, such action was a plain violation of the antitrust laws. Id. at 428.

The Court will also consider the manner in which the action was taken whether it was open in the political arena, or held in secret. For example, a trade organization can openly lobby a legislature for enactment of a statute favorable to their interests. Indeed, the Noerr opinion held that a railroad industry's political campaign to influence legislatures to enact laws favorable to them over the trucking industry was shielded from antitrust immunity.

However, secret meetings to accomplish a specific policy result are more likely to be excluded from the Noerr-Pennington exception. For example, in Allied Tube, members of the steel industry met and collectively agreed to exclude an individual's polyvinyl chloride conduit from the National Electric Code. Allied Tube, 486 U.S. at 496. The National Electric Code is published by the National Fire Protection Agency, which is a private voluntary organization with more than 31,500 members. The Code is adopted by a substantial number of state and local governments with little or no change. The Court held that this action was not shielded by antitrust immunity because it involved anticompetitive behavior triggered by economic motivations. The Court noted that this action did not take

place in the open political arena, but in a private standard-setting process. In explaining its reasoning, the Court stated:

> [W]e hold that at least where, as here, an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no Noerr immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.
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> Id. at 509-510.

It is quite likely that if industry members met and took some sort of action to ensure that they would receive increased rates, or economically beneficial results of government policy, such action would not be protected by Noerr. However, a group of industry members could attempt to petition for a favorable change in policy, even if the results of the policy would be antitcompetitive. Whether such action would be immune from antitrust liability would depend on the nature of the action--did the action occur in the open political arena or behind closed doors. If the action occurred in private, it would be less likely to be afforded antitrust immunity. In addition, a court would consider the motivation of the action--did the industry members petition for politically motivated change, or did they take action as in Superior Court, which was economic in nature, and would ensure favorable results in an anticompetitive manner.